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No. 86-593

In The
Supreme Court of the United States
October Term, 1986

DONALD JOE NOWELL, through his Mother and Next Friend Pamela Mae Nowell; Pamela Mae Nowell, and the Estate of Donald Joe Nowell, by and through Pamela Mae Nowell, Administratrix,

Petitioners,

v.

UNIVERSAL ELECTRIC COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

All interested parties are identified in the petitioners' brief, with one exception: The liability insurance policy covering Universal Electric Company in this case was issued by Employers Insurance of Wausau, a Mutual Company, and a member of the Wausau Insurance Companies Group. The parent organization of the Wausau Insurance Companies Group is Nationwide Insurance Companies.

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DONALD JOE NOWELL, through his Mother and Next Friend Pamela Mae Nowell; Pamela Mae Nowell, and the Estate of Donald Joe Nowell, by and through Pamela Mae Nowell, Administratrix,

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully requests that this Court deny the petition for writ of certiorari.

CITATION TO THE OPINION DELIVERED BELOW

Nowell v. Universal Electric Co., 792 F.2d 1310 (5th Cir. 1986) *reh'g denied*, No. 85-4128 (August 25, 1986)

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the provisions listed in petitioners' brief, the following constitutional provisions, statutes and rules are involved in this case:

28 U.S.C. § 2111

Miss. Code Ann. § 11-7-15 (1972)

Fed. R. Evid. 103(d)

Sup. Ct. R. 34.1(a)

The texts of these provisions are set forth in the Appendix.

———o———

STATEMENT OF THE CASE

With due deference to the petitioners' statement of the case, respondent suggests that the Fifth Circuit's opinion will provide the Court an adequate background for considering the issue before the Court: Should certiorari be granted? From that opinion respondent would emphasize that Instruction P-8-C, the *only* substantive instruction granted from those submitted by petitioners, *was objected to* by respondent, albeit on grounds other than the one relied upon by the panel when it *remanded the case for a new trial.* Furthermore, this Court should note that *petitioners did not argue below* (in their petition for rehearing, *see* Appendix at App. 8-9) that a plain error exception to Rule 51 did not or should not exist or even that it is not uniformly applied; instead, they simply argued that the doctrine did not apply to this case.

REASONS TO DENY THE WRIT OF CERTIORARI

1. The Court Of Appeals' Decision Contemplates Further Proceedings.

Finding error in the *only* substantive instruction granted plaintiffs, the court of appeals reversed and remanded the action to the district court for a completely new trial. Ordinarily, an order granting a new trial is viewed as interlocutory in nature; therefore, it is not immediately appealable absent extraordinary circumstances. *Allied Chemical Corp. v. Daiflon,* 449 U.S. 33, 34 (1980). Since the expressed preference of this Court is to avoid piecemeal litigation by reviewing only "final orders," *see, e.g., O'Dell v. Espinoza,* 456 U.S. 430 (1982); *Laclede Gas Light Co. v. Public Service Commission,* 304 U.S. 398 (1938); and *Slaker v. O'Connor,* 278 U.S. 188 (1929); and since there is no important national policy that would be frustrated by a denial of Supreme Court review at this juncture, certiorari should be denied.[1]

Furthermore, review at this time could be a waste of the Supreme Court's limited resources, for if a verdict more favorable to petitioners is obtained upon retrial of the action, petitioners will no longer complain that the court of appeals erred. Since it is not the policy of this Court to decide abstract, hypothetical or contingent questions or to address constitutional issues in advance of the

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[1] As petitioners admit in their petition for certiorari, at page 12, "[i]t can hardly be asserted that the Mississippi doctrine of comparative negligence, 'comparative proportionate reduction of damages' is a novel issue. Neither can it be asserted that the *amount of damages* awarded to the Plaintiffs by the jury amounts to a matter of general public or judicial concern. . . ." (Emphasis in original.)

necessity for their decision, *see Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268 (1969), the better course would be to deny certiorari pending the retrial of this entire matter in the district court.

2. The Conflict Between The Circuits To Which The Petitioners Allude Is A False Conflict.

Petitioners allege that there is a conflict between the Ninth Circuit and the remaining circuits on the plain error issue, with the Ninth Circuit steadfastly refusing to apply the plain error exception to civil cases. However, in a decision more recent than the four cases petitioners cited in their brief, the Ninth Circuit admitted that the doctrine has validity in that circuit. *See Brown v. Avemco Investment Corp.*, 603 F.2d 1367 (9th Cir. 1979). In fact, in a footnote to the opinion the court gave a list of *seventeen* cases in which the court "found technical noncompliance with Rule 51 but [nevertheless] proceeded to evaluate the merits of the appeal." *Id.* at 1374-75 & n.4. Accordingly, the alleged conflict upon which petitioners rely does not in fact exist.

Furthermore, petitioners contend that in circuits other than the Ninth, the plain error exception is not uniformly applied. However, as is addressed in greater detail in Arguments I and II, *infra*, at 6-16, for at least the last fifty years, the Supreme Court has provided the appeals courts definite and fixed guidelines for applying the exception. Since application of the doctrine requires a subjective determination and a full review of the record, and *as each case necessarily turns on its own facts*, respondent respectfully suggests that *perfect uniformity* of application would be difficult, if not impossible, to achieve. However, since

the cases cited in both briefs indicate that the various circuits are applying the same standards, as promulgated by this Court, respondent submits that as much uniformity as is practicably possible is being achieved and that the intervention of this Court is not required.

3. The Decision Of The Court Of Appeals Does Not Conflict With A Decision Of This Court Or Depart From The Accepted And Usual Course Of Judicial Proceedings.

See Argument II, *infra* at 10-16.

4. The Instant Appeal Does Not Present An Important Issue Of Federal Law, But Instead Is Concerned With The Proper Application Of The Mississippi Comparative Negligence Statute.

See note 1, *supra* at 3.

Furthermore, it is noteworthy that *nowhere* in petitioners' brief do they quarrel with the Fifth Circuit's findings that Instruction P-8-C obviously misstated Mississippi comparative negligence law and that such error seriously affected Universal's substantive rights under the comparative negligence statute.

5. None Of The Arguments Raised By The Petitioners Merit Review.

See Arguments I-IV, *infra* at 6-23.

———o———

ARGUMENT I

Plain Error Is A Valid And Long-Established Doctrine Of Appellate Review.

Petitioners' argument that there is not a valid judicially-developed plain error doctrine in civil practice borders on the ridiculous.[2] Probably the most often cited case dealing with plain error concerned a civil jury instruction. *See, e.g., United States v. Atkinson,* 297 U.S. 157 (1936). *Atkinson* was decided fifty years ago—two years prior to the enactment of Rule 51—and the frequency with which it is still cited today certainly attests to its continued validity. *See, e.g., United States v. Young,* 470 U.S. 1, —, 84 L.Ed.2d 1, 12, 105 S.Ct. 1038, — (1985); *United States v. Frady,* 456 U.S. 152, 163 n.13 (1982).

The inherent authority of a court to address plain error is an important aspect of civil and criminal appellate review. Although the doctrine's use is more widespread in the criminal context and the criminal rules specifically address plain error, *see* Fed. R. Crim. P. 52(b), authority for it is also found in various enactments which apply with equal force to civil cases, *see, e.g.,* 28 U.S.C. § 2111;

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[2] It is interesting to note that in their "Petition for Rehearing or in the Alternative a Petition for Modification of the Court's Mandate," *see* Appendix at App. 8-9, petitioners *conceded* that a plain error exception to Rule 51 existed. In that brief petitioners concentrated their energies on trying to convince the appeals court that the instruction did not constitute plain error, *see id.;* petitioners have not taken that tactic in this court. Likewise, the *amicus curiae* brief filed on rehearing by the Mississippi Trial Lawyers Association assumed that a plain error doctrine existed and argued that there was no plain error in this case and that the exception was applied in an overly broad manner. *See* Appendix at App. 10.

Fed. R. Evid. 103(d); Sup. Ct. R. 34.1(a). Furthermore, the most important testament to the continued validity of the doctrine in the civil context is the regularity with which it has been invoked to allow the United States Supreme Court to reach important issues not raised by the parties to the litigation. *See, e.g., Erie R.R. v. Tompkins,* 304 U.S. 64, 82 (1938) (application of state substantive law in diversity cases; dissent criticized majority for considering an issue not raised below or presented by the petition). *See also City of Oklahoma v. Tuttle,* 471 U.S. 808 (1985) (interpretation of Section 1983; jury instruction reviewed despite the defendant's admitted failure to object at trial); *United States v. Frady,* 456 U.S. 152, 166 n.15 (1982) (habeas corpus proceeding; "plain error" applicable to review of court's Section 2255 hearing); *Procunier v. Navarette,* 434 U.S. 555, 559 n.6 (1978) (scope of constitutional protection for prisoner's mailing privileges; even if issue not "fairly comprised" by the issues presented in the petition for certiorari, Court's power was not limited by the precise terms of the questions presented); *Connor v. Finch,* 431 U.S. 407, 421 n.19 (1977) (redistricting decision; Court has "authority and duty in exceptional circumstances to notice federal court errors to which no exception was taken, when they 'seriously affect the fairness, integrity or reputation of public judicial proceedings.' "); *Washington v. Davis,* 426 U.S. 229, 238 (1976) (appeals court applied incorrect legal standard under Title VII; "Although the petition for certiorari did not present this ground for reversal, our Rule 40(d)(1)(2) provides that we 'may notice a plain error not presented'; and this is an appropriate occasion to invoke the Rule."); *Blonder-Tongue Laboratories, Inc. v. University of Illinois,* 402 U.S. 313, 320 n.6

(1971) (collateral estoppel; while the Court is not required to decide questions not raised in a petition for certiorari, this does not limit the Court's power to decide important questions raised by the parties); *Hormel v. Helvering,* 312 U.S. 552, 556-58 (1941) (tax appeal; Court affirmed appeals court's authority to pass on questions not presented below); *Sibbach v. Wilson & Co.,* 312 U.S. 1, 16 (1941) (Rule 35 medical examination; contempt order overturned on "a plain error of such fundamental nature" that the Court should notice it); *cf. City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 256, & 257 n.15 (1981) (failure to object to jury instruction allowing punitive damages against a municipality under Section 1983; Court acknowledged a plain error exception to Rule 51 and applied a modified plain error standard of review to an unsettled issue of federal law).

Nevertheless, petitioners have insisted that there is simply "no room for a 'plain error' exception" to Rule 51, *see* petition at 10, thereby encouraging a practice of rigid adherence to the contemporaneous objection requirement. However, a similar policy of rigid adherence to court rules was squarely rejected by this Court in *Hormel v. Helvering,* 312 U.S. 552, 555-58 (1941) (emphasis added) in an analogous context:

> Petitioner in effect challenges the power of the Circuit Court of Appeals to pass upon any questions other than those which were directly and squarely presented in the proceedings before the Board of Tax Appeals. . . .
>
> Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to

issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence. . . . Recognition of this general principle has caused this Court to say on a number of occasions that the reviewing court should pass by, without decision, questions which were not urged before the Board of Tax Appeals. But those cases do not announce an inflexible practice, as indeed they could not without doing violence to the statutes which give to Circuit Court of Appeals reviewing decisions of the Board of Tax Appeals the power to modify, reverse or remand decisions not in accordance with law "as justice may require." There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below. *See Blair v. Oesterlein Mach. Co.*, 275 US 220, 225, 72 L.Ed. 249, 252, 48 S.Ct. 87.

Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with the policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice. And examination of the cases relied upon by petitioner discloses that this Court, in following in some cases the general principle sought to be invoked here by petitioner, has been careful to point out the circumstances justifying application of the practice in the particular case. . . . These decisions and

> others like them, while recognizing the desirability and existence of a general practice under which appellate courts confine themselves to the issues raised below, nevertheless do not lose sight of the fact that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice.

Cf. United States v. Young, 470 U.S. 1, —, 84 L.Ed.2d 1, 12, 105 S.Ct. 1038, — (1985) ("The plain error doctrine of Federal Rule Criminal Procedure 52(b) tempers the blow of a rigid application of the contemporaneous objection requirement.") (Footnote omitted).

The plain error exception to the contemporaneous objection rule is well recognized, despite the unexplained failure of the drafters of the Federal Rules of Civil Procedure to specifically include a provision to that effect in Rule 51. Accordingly, there is no basis for granting the writ on this issue.

ARGUMENT II

Sufficiently Specific Rules Have Been Delineated To Govern How And When The Plain Error Doctrine Should Be Used And These Rules Were Properly Applied In This Case.

Despite petitioners' suggestion that the standards for invocation of the plain error doctrine are not sufficiently established, *Atkinson* very clearly delineated the relevant factors:

> The verdict of a jury will not ordinarily be set aside for error not brought to the attention of the trial court. This practice is founded upon considerations of fairness to the court and to the parties and

> of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact. . . .
>
> [However,] [i]n exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, *if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.*

297 U.S. at 159-60 (emphasis added). These standards have been reaffirmed by the Supreme Court on numerous occasions, *see, e.g., United States v. Young*, 470 U.S. 1, —, 84 L.Ed.2d 1, 12, 105 S.Ct. 1038, — (1985); *Connor v. Finch*, 431 U.S. 407, 421 n.19 (1977); *Silber v. United States*, 370 U.S. 717, 718 (1962); *Johnson v. United States*, 318 U.S. 189, 200 (1943). The plain error standard has also been alternatively defined in terms of errors of a "fundamental nature," *see, e.g., Sibbach v. Wilson & Co.*, 312 U.S. 1, 16 (1941); and errors "on a vital phase of the case and affect[ing] the substantial rights" of the aggrieved party. *See United Brotherhood of Carpenters & Joiners v. United States*, 330 U.S. 395, 412 (1947). As stated recently in *United States v. Young*, 470 U.S. 1, — n.14, 84 L.Ed.2d 1, 13 n.14, 105 S.Ct. 1038, — n.14 (1985),

> federal courts have consistently interpreted the plain error doctrine as requiring an appellate court to find that the claimed error not only seriously affected "substantial rights," but that it had an unfair prejudicial impact on the jury's deliberations. Only then would the court be able to conclude that the error undermined the fairness of the trial and contributed to a miscarriage of justice. To do otherwise could well lead to having appellate courts indulge in the pointless exercise of reviewing "harmless plain er-

> rors''—a practice that is contrary to the draftman's intention behind Rule 52(b), see n 12, supra, and one that courts have studiously avoided and commentators have properly criticized. . . .

Despite these well-defined standards, which have been repeatedly applied by the courts, *see* cases cited in Argument I, *supra,* petitioners contend that this Court should outline a four-part test for prospective application in plain error cases. Assuming for the sake of argument that the four specific guidelines suggested by the petitioners in their brief are not already embodied in the plain error case law,[3] it is doutbful that more or different rules for the application of the plain error doctrine would be helpful. Furthermore, if formulated, it is questionable whether they could be policed by this Court on a case-by-case basis with any reasonable degree of success.

First of all, a court's decision to term an error ''fundamental'' is an individual, subjective one; since it is based upon the particular facts of that case, the decision is one that usually cannot be accurately predicted. *See* 10 J. Moore & H. Bendix, *Moore's Federal Practice* ¶ 103.41 (2d ed. 1985). For this reason it is questionable whether standards different from or more detailed than those already in use would be of help to the courts.

Second, since each case necessarily turns on its own facts, a decision to term an error as ''plain error'' requires a review of the entire trial court record. *See, e.g.,*

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[3] Petitioners argue that the case law does not contain adequate guidelines for application of the doctrine, yet oddly enough for each "additional" guideline petitioners urge, they are able to identify a specific reported decision in which the guideline has already been applied. *See* petition at 17-18.

United States v. Young, 470 U.S. 1, —, 84 L.Ed.2d 1, 13, 105 S.Ct. 1038, — (1985) ("[W]hen addressing plain error, a reviewing court cannot properly evaluate a case except by viewing such a claim against the entire record. . . . It is simply not possible for an appellate court to assess the seriousness of the claimed error by any other means."); *Vachon v. New Hampshire*, 414 U.S. 478, 479 n.3 (1974). This need to review the entire record would put an extreme burden on this Court if it attempted to engage in case-by-case review of appeals court's plain error determinations. As Justice Brennan pointed out recently in his dissent to *United States v. Young*, 470 U.S. 1, —, 84 L.Ed.2d 1, 24-25, 105 S.Ct. 1038, — (1985) (Brennan, J., dissenting) (emphasis added), it is simply not practical for the Supreme Court to make individual plain error decisions without the waste of valuable judicial resources:

> Our traditional practice has been to leave fact-bound questions of possible prejudicial error to the lower court on remand. . . . Two important considerations undergrid this practice. First, the function of this Court is not primarily to correct factual errors in lower court decisions, but instead to resolve important questions of federal law and to exercise supervisory power over lower federal courts. *Our institutional role properly is focused on ensuring clarity and uniformity of legal doctrine, and not on the case-specific process of reviewing the application of law to the particularized facts of individual disputes—one of the functions performed quite capably by the federal courts of appeals.* This allocation of responsibilities can result in subtle but vitally important differences in institutional outlook, differences that should not be shortcut simply because a majority decides the evidence of a particular defendant's guilt

is "overwhelming" and "established beyond any doubt whatever." Ante, at —, 84 L.Ed. 2d —.

Second, if the Court is to be evenhanded in its willingness to review lower courts' plain-error and harmless-error determinations, we will be required to undertake such analyses with ever-increasing frequency. Yet this Court simply is not institutionally capable of conducting the sort of detailed record analyses required in properly administering the plain-error and harmless-error doctrines.

> This Court is far too busy to be spending countless hours reviewing trial transcripts in an effort to determine the likelihood that an error may have affected a jury's deliberations. . . . As a practical matter, it is impossible for any Member of this Court to make the kind of conscientious and detailed examination of the record that should precede a determination that there can be no reasonable doubt that the jury's deliberations as to [the] defendant were not affected by the alleged error. And it is an insult to the Court of Appeals to imply, as the Court does today, that it cannot be trusted with a task that would normally be conducted on remand.

United States v. Hastings, 461 U.S. 499, 516-517, 76 L Ed 2d 96, 103 S Ct 1974 (1983) (Stevens, J., concurring in judgment).

For these two reasons, the changed standards petitioners urge are simply not workable and would be of questionable utility.

Returning to the standards clearly set forth in *Atkinson* and the Court's other cases, a review of the most recent Fifth Circuit plain error civil decisions indicates that the Fifth Circuit is dutifully applying the standards set by this Court. *See, e.g., Haas v. Atlantic Richfield*, 799 F.2d 1011, 1016-17 (5th Cir. 1986) (failure to give

instruction on employer fault not plain error; instructions given on comparative fault not plain error); *Middleton v. Harris Press & Shear, Inc.*, 796 F.2d 747 (5th Cir. 1986) (no plain error; answers to special interrogatories indicated that erroneous instruction was harmless); *Hale v. Cotton Petroleum Corp.*, 796 F.2d 74, 76 (5th Cir. 1986) ("while we might reach a different result under another standard of review, under the plain error rule we must disagree with [appellant] . . ."); *Reese v. Mercury Marine Division of Brunswick Corp.*, 793 F.2d 1416 (5th Cir. 1986) (clearly improper closing argument, remarks by the trial judge and the exclusion of evidence did not rise to plain error).

Furthermore, a review of the authority cited by the *Nowell* panel in its opinion indicated that, contrary to petitioners' contentions, *see* petition at 7, the panel did apply the proper standards. *See, e.g., Rodrigue v. Dixilyn Corp.*, 620 F.2d 537, 540-41 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981) ("The doctrine is not a routine by-pass to Rule 51. . . ."); *Industrial Development Board v. Fuqua Industries, Inc.*, 523 F.2d 1226, 1240 (5th Cir. 1975) ("Once the jury demonstrates that it is concerned with an issue [by sending a note requesting that the charge be re-read] it cannot be said that a clearly erroneous instruction was not prejudicial."); *Sheppard Federal Credit Union v. Palmer*, 408 F.2d 1369, 1371 (5th Cir. 1969) ("The determination of whether justice has miscarried is not always easy. The criterion is certainly not whether the court approves or does not disapprove the result of the case.") Based upon its application of these standards, the panel's decision cannot be assailed.

The panel found that the jury had been read two inconsistent instructions stating diametrically opposed

propositions of law which cut to the very heart of a material issue in the case (the application of Mississippi's comparative negligence statute, *see* Miss. Code Ann. § 11-7-15 (1982)). The respondent did object to the instruction as given, albeit on other grounds; therefore, it cannot be said that respondent silently approved of the instruction or waived its objection. *See Johnson v. United States,* 318 U.S. 189, 199-201 (1943). The error was an obvious one, *see* Appendix at App. 1-2, and since the jury manifested its confusion by requesting a copy of the instructions, which request was denied, *see Industrial Development Board v. Fuqua Industries, Inc.,* 523 F.2d 1226, 1240 (5th Cir. 1975), the panel did not abuse its discretion in deciding that the erroneous instruction had a prejudicial impact on the jury. The verdict was properly vacated and certiorari is not warranted on this issue.

ARGUMENT III

The Fifth Circuit Did Not Err In Setting Aside The General Verdict And Ordering A Complete New Trial—Retrial Of All Issues Is Necessary To Preserve Universal's Right to Trial By Jury.

Petitioners contend that the Fifth Circuit infringed upon petitioners' Seventh Amendment rights by vacating the general verdict and ordering a new trial on all issues. Petitioners' argument is that the general verdict conclusively established Universal's liability and that the Seventh Amendment forbids a second jury from readdressing that issue. However, as established precedent demonstrates, anything less than a complete retrial of this

case would infringe upon *Universal's* Seventh Amendment right to trial by jury.

In *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), the Supreme Court addressed the issue of whether the Seventh Amendment allowed the retrial of less than all of the issues of a cause. Although the Court found that partial retrials did not *per se* offend the Seventh Amendment, it cautioned against their liberal use: "Where the practice permits a partial new trial, it may not be resorted to unless it *clearly* appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.* at 500 (emphasis added).

In *Gasoline Products* the appeals court had ordered that defendant's counterclaim be retried, but only on the issue of damages. However, the Supreme Court disagreed, saying the general verdict on the counterclaim was inconclusive on the liability issue. Furthermore, the issues of liability and damages were not separable: "Here the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." *Id.*

Recent cases applying *Gasoline Products* have refused to order a partial retrial of damages alone if it appeared that the verdict reached was the result of a compromise on damage and liability or if it appeared that error on the damages issue may have affected the liability determination. *See, e.g., Stanton v. Astra Pharmaceutical Products, Inc.*, 718 F.2d 553, 576-78 (3d Cir. 1983) (complete

retrial ordered when the jury's inconsistent answers to "special questions," apparent jury confusion and a comparison of the damages awarded and the damages sought indicated a possible compromise verdict); *Mekdeci v. Merrell National Laboratories,* 711 F.2d 1510, 1513-15 (11th Cir. 1983) (compromise verdict indicated when damages awarded were insufficient, the liability issue was hotly contested, the jurors' communications with the judge indicated their focus on the liability issue and an Allen charge may have prompted a hasty decision); *Ouachita National Bank v. Tosco Corp.,* 686 F.2d 1291, 1299 (8th Cir. 1982) (trial court's action in ordering an entire new trial upheld when comparison of damages sought and damages awarded indicated that the jury possibly felt plaintiff was also at fault); *cf. Franchi Construction Co. v. Combined Insurance Co. of America,* 580 F.2d 1, 8 (1st Cir. 1978) ("The trial court's emphasis on the possible economic benefit to be realized in conducting a resumed trial must yield to the injustice resulting here in trying interconnected damages issues separately to different juries."). *See generally* 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2814 (1973).

Partial retrials are more likely to be had in instances where detailed special interrogatories are submitted to the jury and the court can be certain that the issues not to be retried are definitely settled and not tainted by the error requiring the remaining issues to be reexamined. *See, e.g., Martell v. Boardwalk Enterprises, Inc.,* 748 F.2d 740, 755-56 (2d Cir. 1984) (partial retrial appropriate since special interrogatories were propounded, the court's instructions on the use of the special interrogatories were clear and the appeals court had no basis for supposing

that the jury confused the issues); *Crane v. Consolidated Rail Corp.*, 731 F.2d 1042, 1050 (2d Cir. 1984) (" 'when a jury arrives at its decision by detailed special verdicts, enabling a trial or a reviewing court to be reasonably certain that an erroneous verdict was reached independent of another verdict, a partial retrial may be in order . . .' " (*quoting Akermanis v. Sealand Service, Inc.*, 688 F.2d 898, 906 (2d Cir. 1980), *cert. denied*, 461 U.S. 927 (1983)), *cert. denied*, 469 U.S. 854 (1984).

Under the *Gasoline Products* line, it is clear that the Fifth Circuit's discretionary decision to order a complete retrial was correct. In the instant case liability was hotly contested; Universal defended on the theories that the drum involved was not Universal's, *see Nowell*, 792 F.2d at 1311-12, 1314-15, and that Universal had no duty to warn Donald Joe Nowell because he and Wendell Edwards both appreciated the risk involved in welding on an empty 55-gallon drum without first checking to make sure it was clean, *id.* at 1312-13. The jury was given conflicting instructions and its confusion was manifested in a request for a copy of the instructions, *id.* at 1316. While the million dollar verdict returned was substantial, petitioners argued in their petition for rehearing that undisputed evidence justified a verdict two and one-half to six times as high. *See* Appendix at App. 8-9. If the jury was persuaded by the erroneous instruction that it must return *all* of plaintiffs' damages, then under petitioners' interpretation of the evidence the $1,000,000 verdict would have to represent a compromise. In light of these circumstances and since the verdict was a general one which did not specifically resolve the issue of comparative fault, the Fifth Circuit panel could not clearly say that the issue of Uni-

versal's negligence was so distinct from the issues of Nowell's contributory fault and damages that the retrial could have been limited to these issues.

The only two cases petitioners cite on their partial retrial issue are not persuasive. In *City of Jackson v. Copeland*, 490 So. 2d 834 (Miss. 1986), while it is not even clear whether an entire or partial retrial was ordered, *id.* at 839, it is clear that the Seventh Amendment issue was not specifically addressed. Likewise, *Rodrigue v. Dixilyn Corp.*, 620 F.2d 537 (5th Cir. 1980), *cert. denied*, 449 U.S. 113 (1981), is not controlling. Since contributory negligence was not available as a defense in *Rodrigue* and liability was clearly established, the only remaining issue was the amount of damages to be awarded. Such is not the case here.

In their brief petitioners also contend that they were denied their due process "opportunity to be heard" on the partial retrial issue because the Fifth Circuit denied their Petition for Rehearing without oral argument or a written opinion. However, due process does not require that an appellate court hear oral arguments before deciding an issue, even where substantial questions of law are involved. *See, e.g., Dredge Corp. v. Penny*, 338 F.2d 456, 462 n.14 (9th Cir. 1964); *In Re Citizens Investment Trust*, 25 B.R. 1005, 1008 (D. Mass. 1982). Likewise, there is no constitutional requirement that a written opinion be issued in this appeal. *See, e.g., Harris v. Rivera*, 454 U.S. 339, 344 (1981) ("Although there are occasions when an explanation of the reasons for a decision may be required by the demands of due process, such occasions are exceptions rather than the rule." (footnotes omitted); *Sumner v.*

Mata, 449 U.S. 539, 548 (1981) ("a court need not elaborate or give reasons for rejecting claims which it regards as frivolous or totally without merit."); *Taylor v. McKeithan,* 407 U.S. 191, 194 n.4 (1972) ("the court of appeals should have wide latitude in their decisions of whether or how to write opinions."); *Riley v. Lockhart,* 726 F.2d 421 (8th Cir. 1984) (state court was not required to issue a written opinion when it denied the petitioner's motion collaterally attacking his conviction); *Furman v. United States,* 720 F.2d 263, 264 (2d Cir. 1983) ("The premise underlying Furman's appeal is that the parties' contentions on appeal have been given inadequate consideration whenever the appellate court's decision was not accompanied by a written and published opinion. The premise has no sound basis in law or in fact."); *Westside Property Owners v. Schlesinger,* 597 F.2d 1214, 1216 n.3 (9th Cir. 1979) (the district court had no obligation to address every legal or factual argument made by the parties).

Despite the fact that the Fifth Circuit panel denied the petition without an opinion, petitioners had ample opportunity to brief the issues on rehearing, *see* Appendix at App. 5, and leave was granted to both the Association of Trial Lawyers of America and the Mississippi Trial Lawyers Association to file *amicus curiae* briefs on petitioners' behalf. *See* Appendix at App. 6-7. Furthermore, there is no question that the panel members were well-acquainted with the applicable standards regarding partial retrials, as a review of their recent opinions on this exact issue demonstrate. *See Colonial Leasing of New England, Inc. v. Logistics Control International,* 770 F.2d 479 (5th Cir. 1985) (*per curiam*); *Brooks v. Great Lakes Dredge-Dock*

Co., 754 F.2d 539 (5th Cir. 1985) (Jolly, J.). Accordingly, there was no error and there is no reason to grant certiorari on this ground.

ARGUMENT IV

The Petitioners Have Failed To Identify Any Due Process Violations.

The petitioners' final argument is merely a combination of the three prior arguments with the underlying theme being that the appeals court denied petitioners' due process rights when it 1) decided the appeal on an issue not raised in the notice of appeal, 2) did not give the parties a pre-opinion opportunity to brief the issues, 3) made certain erroneous findings of fact in its opinion and 4) denied petitioners' motion for rehearing on the plain error and partial retrial issues without a written opinion. Since contentions 1, 2 and 4 have already been addressed in the other arguments of the brief, Universal will address only contention 3 in this argument.

The due process clause does not assure petitioners of a favorable judicial decision, an error-free decision or even one that is just; instead, due process only guarantees that the decision will be reached by a process that is fair. *See, e.g., Brault v. Town of Milton*, 527 F.2d 730, 739 (2d Cir. 1975) (*on reh'g en banc*); *United States v. Wallace*, 448 F. Supp. 164, 166 (E.D. Va. 1978); *Franklin v. First Money, Inc.*, 427 F. Supp. 66, 68 (E.D. La. 1976), *aff'd*, 599 F.2d 615 (5th Cir. 1979). If the appeals court did make any errors in its factual findings, that is regrettable. However, this Court is not a forum for the correction of errors.

See Board of Education v. McCluskey, 458 U.S. 966, 971 (1982) (Stevens, J., dissenting). Furthermore, petitioners had ample opportunity to and did point out the alleged error to the Fifth Circuit in their Petition for Rehearing. *See* Appendix at App. 8-9. Perhaps the panel's failure to issue a supplemental opinion on this point indicated that the change suggested in the factual finding would not have altered the panel's application of the plain-error doctrine. This is the most reasonable inference as the only specific error which petitioners have identified, *see* petition at 23, is not serious enough to alter the outcome of this case or to warrant the issuance of a writ of certiorari on this ground.

—o—

CONCLUSION

Universal Electric Company respectfully suggests that the Petition for Writ of Certiorari be denied. The decision of the court of appeals in this diversity case comports with well-settled federal statutory and case law on plain-error, partial retrial and due process, and does not present an important question of federal law which would merit the granting of certiorari and the reexamination of these principals. The portion of the appeals court's opinion by which petitioners are aggrieved was based upon an erroneous instruction unique to this case and involving the proper application of the Mississippi comparative negligence statute. Since the petitioners can make no argument that the instruction isolated by the court of appeals was

not clearly and obviously erroneous, certiorari is inappropriate under Rule 17 and should not be granted.

Respectfully submitted,

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APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAY 24 1985
CLARENCE A. PIERCE, CLERK
BY DEPUTY

DONALD JOE NOWELL, II, BY
AND THROUGH HIS MOTHER AND NEXT FRIEND,
PAMELA MAE NOWELL; PAMELA MAE NOWELL;
AND THE ESTATE OF DONALD JOE NOWELL,
BY AND THROUGH PAMELA MAE NOWELL,
ADMINISTRATRIX

PLAINTIFFS

VS.

CIVIL ACTION NO. E82-0094 (L)

UNIVERSAL ELECTRIC COMPANY

DEFENDANT

U.S. COURT OF APPEALS
RECEIVED
MAY 28 1985
NEW ORLEANS, LA.

INSTRUCTION NO. _____

The Court instructs the jury that in the event that you find that the defendant, Universal Electric Company, through its employees was guilty of negligence in either of the following manners:

1. By disposing of the barrels by selling to ~~an individual, namely,~~ Wendell Edwards, for use by Donald Joe Nowell, if you first find that such act is negligence.

2. By failing to completely and adequately warn and instruct individuals who would come in contact with the barrels on the safe and non-hazardous use of the barrels, how to make the barrels safe for use, and as to the continued hazardous condition of the barrels, if you find that such was negligence.

3. By failing to re-lable the barrels so as to plainly, obviously, and in a manner calculated to catch the attention of those who are to come into contact with the barrels, that Universal Electric Company had emptied the barrels of its contents, had not cleaned or otherwise made the barrels safe, and that it was still in a hazardous condition, if you find that that was negligence.

4. By failing to eliminate the hazard of explosion by destroying the barrels, cutting the top out of the barrels, or by cleaning the barrels, if you find such was negligence,

and if you further find from a preponderance of the credible evidence that Donald Joe Nowell was injured as a proximate result or contributing result of said negligence on April 29, 1981, and subsequently died as a result of said injuries on August 28, 1981, then it is your sworn duty to return a verdict for the plaintiffs in an amount adequate to compensate the plaintiffs for all damages sustained.

App. 2

Restatement of Torts 2nd, §388
Gordon v. Niagra Machine and Tool Works, 574 F.2d 1182 (5thCir. 1978); Borel v. Fireboard Paper Products Corporation, 493 F.2d 1076 (5thCir. 1974); Shell Oil Company v. Gutierrez, 581 P.2d 271 (Ariz.App. 1978); Spruill v. Boil-Midway, Inc., 308 F.2d 79 (4thCir. 1962); Buck v. Wicks Corp., 378 NE.2d 964 (Mass. 1978); Aderson v. Klix Chemical Company, 256 Or. 199 472 P.2d 806 (1970); Gulf Refining Company v. Williams, 185 S. 234 (Miss. 19); D'Arienzo v. Clairol, 310 A.2d 106 (N.J. 1973) 6 Am Jur Proof of Facts 2d 175, §2; Miller v. New Zealand Insurance Company, 98 S.2d 544 (La.App. 1957); Gronlie v. Positive Safety Manufacturing Company, 212 NW.2d 756 (Mich. 1973); Gall v. Union Ice, 239 P.2d 48 (Cal. 1971); J. C. Penney Company v. Morris, 173 MS 710, 163 So. 124 (1935); Cadillac Corporation v. Moore, 320 So.2d 361 (Miss. 1975); Fiorentino v. Staley Mfg. Co., 416 NE.2d (Mass.App. 1981)

APPENDIX II

The pertinent text of the statutory provisions and court rules involved are as follows:

1. 28 U.S.C. § 2111

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

2. Miss. Code Ann. § 11-7-15

> In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.

3. Fed. R. Evid. 103(d)

> Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

4. Sup. Ct. R. 34.1(a)

> A brief of an appellant or petitioner on the merits shall comply in all respects with Rule 33, and shall contain in the order here indicated:
>
> > (a) The questions presented for review, stated as required by Rule 15.1(a) or Rule 21.1(a), as the case may be. The phrasing of the questions presented need not be iden-

tical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.

APPENDIX III

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-4128

DONALD JOE NOWELL, II by and through his Mother and Next Friend, Pamela Mae Nowell; Pamela Mae Nowell, and the Estates of Donald Joe Nowell, by and through Pamela Mae Nowell, Administratrix,

Plaintiff-Appellees,

versus

UNIVERSAL ELECTRIC COMPANY,

Defendant-Appellant,

versus

UNITED STATES FIDELITY & GUARANTY COMPANY,

Intervenor-Appellee.

Appeal from the United States District Court for the Southern District of Mississippi

(filed July 11, 1986)

ORDER:

IT IS ORDERED that appellee's motion for leave to file a brief not to exceed 25 printed pages on the issues presented in its petition for rehearing and for an extension of time to and including July 23, 1986, within which to file such brief is Granted.

/s/ E. Grady Jolly
UNITED STATES
CIRCUIT JUDGE

APPENDIX IV

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-4128

DONALD JOE NOWELL, II by and through his Mother and Next Friend, Pamela Mae Nowell; Pamela Mae Nowell, and the Estate of Donald Joe Nowell, by and through Pamela Mae Nowell, Administratrix,

Plaintiffs-Appellees,

versus

UNIVERSAL ELECTRIC COMPANY,

Defendant-Appellant,

versus

UNITED STATES FIDELITY & GUARANTY COMPANY,

Intervenor-Appellee.

Appeal from the United States District Court for the Southern District of Mississippi

(filed August 11, 1986)

ORDER:

IT IS ORDERED that the motion of the Mississippi Trial Lawyers Association for leave to file an amicus curiae brief in support of appellee's petition for rehearing is Granted.

/s/ E. Grady Jolly
UNITED STATES
CIRCUIT JUDGE

APPENDIX V

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-4128

DONALD JOE NOWELL, II by and through his Mother and Next Friend, Pamela Mae Nowell; Pamela Mae Nowell, and the Estate of Donald Joe Nowell, by and through Pamela Mae Nowell, Administratrix,

Plaintiffs-Appellees,

versus

UNIVERSAL ELECTRIC COMPANY,

Defendant-Appellant,

versus

UNITED STATES FIDELITY & GUARANTY COMPANY,

Intervenor-Appellee.

Appeal from the United States District Court for the Southern District of Mississippi

(filed August 11, 1986)

ORDER:

IT IS ORDERED that the motion of the Association of Trial Lawyers of America for leave to file an amicus curiae brief in support of appellee's petition for rehearing is Granted.

/s/ E. Grady Jolly
UNITED STATES
CIRCUIT JUDGE

APPENDIX VI

We submit, as we will later argue in detail, that the undisputed evidence of the full damages sustained by Nowell is some multiple between 2.5 and 6 times greater than the one million dollar verdict returned by the jury. Therefore, Nowell urgently contends that the facts regarding the jury's determination of the amount of damages do not justify the application of the "Plain Error" exception.

I. THE "PLAIN ERROR" EXCEPTION IS NEITHER FACTUALLY NOR LEGALLY APPLICABLE TO THE CASE AT BAR.

Universal did not object to either the first or the second aspect of the District Court's charge discussed by this Court in its opinion—on any ground—much less the ground that the two aspects of the court's charge were in conflict. Ordinarily, the appellant must affirmatively show compliance with the mandatory requirements of FRCP Rule 51 in order to preserve as error a challenge to the District Court's jury charge. The "Plain Error" exception is just that—an *exception!* The courts have alternately noted that the "Plain Error" exception is a "narrow exception" [*Batesole v. Stratford,* 505 F.2d 804, 808 (6th Cir. 1974)] which should be applied "sparingly" and only in "exceptional cases" or under "peculiar circumstances." *Nimrod v. Sylvester,* 369 F.2d 870, 873 (1st Cir. 1966). See also *Delancey v. Motichek Towing Service, Inc.,* 427 F.2d 897, 901 (5th Cir. 1970); *Troupe v. Chicago D & G Bay Transit Company,* 234 F.2d 253, 259-260 (2nd Cir. 1956).

There seem to be three factors affecting the applicability of the "Plain Error" exception.

* * *

CONCERNING THE FIRST FACTOR.

It does not plainly and obviously appear on the face of the record that the jury misapplied the Mississippi comparative negligence rule either from the standpoint of a legal or a factual analysis.

* * *

In view of the fact that the undisputed evidence and uncontested arguments concerning the amount of the Nowells' loss ranged between $2.6 million and $6.0 million there can be little doubt that the jury did not fully compensate the plaintiffs for "all damages sustained" but did, in fact, reduce the amount of their award in proportion to Donald Joe's own ngeligence [sic].

APPENDIX VII

SUMMARY OF ARGUMENT

This Brief shall first propound the contention that no Plain Error existed in the case at bar, and that the Plain Error exception was applied in an overly broad manner.

* * *

As noted by this Court, a failure to object to an offending instruction normally precludes review by the appellate court. The "Plain Error" exception, meant to be a rare cure for unobjected-to error in instructions, is very rarely applied. 9 C. Wright and A. Miller, Federal Practice and Procedure § 2558, page 672 (1971). Of course, application of such an awesome power is rightfully restricted to only the most egregious of errors.

* * *

This Court also cited in its Opinion a string of cases in which is [sic] has applied the "Plain Error" doctrine. On closer inspection, each of these cases can be easily distinguished.

In *Rodrigue v. Dixilyn Corp.*, 620 F.2d 537 (5th Cir. 1980), the complained of error was raised on appeal by Appellant. Furthermore, the court noted that the verdict in that case reflected a strong possibility that the law of the forum state had not been applied as a result of the faulty instruction. This is readily distinguishable from the case at bar, wherein the sole effect of any possible error would concern the amount of the verdict. Again, the amount of the verdict reflects that the jury followed the proper law of the forum state.